

1 Amend (#12/#15) on December 14, 2005. Defendants replied to the
2 response (#13) on December 27, 2005 and opposed the motion to amend
3 (#14) on December 29, 2005. Plaintiff filed a response to the
4 opposition to the Motion for Leave to Amend (#16) on January 17,
5 2006. The motions (#9/#15) are now ripe and we now rule on them.

6 For the reasons stated below, Defendants' Motion for Partial
7 Summary Judgment will be granted and Plaintiff's Motion for Leave
8 to Amend will be denied.

9 **II. Statement of Facts**

10 Plaintiff was employed by the Nevada System of Higher
11 Education under the supervision of Dean Mike Reed. Plaintiff was
12 ordered by Reed to hire Michelle Dowling as her assistant. Dowling
13 was twenty-five years old at the time.

14 Dowling was subsequently promoted to report to the Assistant
15 Dean. After this promotion of Dowling, Plaintiff claims that she
16 was subjected to adverse employment action consisting of
17 restriction in her job duties while previously she had not been
18 subject to such restrictions.

19 Plaintiff claims that Dowling was allowed to take classes to
20 complete her degree during work hours whereas Plaintiff was told
21 she had to take classes during her lunch break. Plaintiff claims
22 Dowling was given an assistant whereas Plaintiff had repeatedly
23 requested an assistant and was denied one.

24 Plaintiff has also been subject to poor performance reviews.
25 She has been written up four times and received a substandard
26 evaluation. These were the first substandard evaluations that she
27 had received in the twenty-three years she had been working for the
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1 Nevada System of Higher Education. Plaintiff claims that her
2 actions were subject to scrutiny whereas younger employees did
3 similar things and were not written up. Plaintiff was eventually
4 replaced by a younger employee.

5 Plaintiff filed a complaint with the Nevada Equal Rights
6 Commission (NERC) on July 19, 2004. Plaintiff claims that she was
7 retaliated against for this filing.

8 9 **II. Discussion**

10 Defendants claim, in their Motion for Partial Summary
11 Judgment, that the Supreme Court has held that the Eleventh
12 Amendment bars actions under the ADEA against State actors and that
13 because of this, Plaintiff's first cause of action (for illegal age
14 discrimination under the ADEA) fails.

15 Plaintiff has not opposed the Motion for Partial Summary
16 Judgment but has instead moved for this court to grant a leave to
17 amend her Complaint to change the first cause of action from an
18 action under the ADEA to an action under 42 U.S.C. § 1983 against
19 Defendant Reed for violation of Plaintiff's Fourteenth Amendment
20 Right to Equal Protection on the basis of age.

21 Defendants claim that Plaintiff is not entitled to leave to
22 amend because the ADEA is the exclusive remedy for age
23 discrimination and therefore there is no cause of action under the
24 Fourteenth Amendment for age discrimination.

1 **A. Summary Judgment Standard**

2 Summary judgment allows courts to avoid unnecessary trials
3 where no material factual dispute exists. Northwest Motorcycle
4 Ass'n v. U.S. Department of Agriculture, 18 F.3d 1468, 1471 (9th
5 Cir. 1994). The court must view the evidence and the inferences
6 arising therefrom in the light most favorable to the nonmoving
7 party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and
8 should award summary judgment where no genuine issues of material
9 fact remain in dispute and the moving party is entitled to judgment
10 as a matter of law. Fed. R. Civ. P. 56(c). Judgment as a matter
11 of law is appropriate where there is no legally sufficient
12 evidentiary basis for a reasonable jury to find for the nonmoving
13 party. Fed. R. Civ. P. 50(a). Where reasonable minds could differ
14 on the material facts at issue, however, summary judgment should
15 not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th
16 Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

17 The moving party bears the burden of informing the court
18 of the basis for its motion, together with evidence demonstrating
19 the absence of any genuine issue of material fact. Celotex Corp.
20 v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has
21 met its burden, the party opposing the motion may not rest upon
22 mere allegations or denials in the pleadings, but must set forth
23 specific facts showing that there exists a genuine issue for trial.
24 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

25 Although the parties may submit evidence in an inadmissible form--
26 namely, depositions, admissions, interrogatory answers, and
27 affidavits--only evidence which might be admissible at trial may be

1 considered by a trial court in ruling on a motion for summary
2 judgment. Fed. R. Civ. P. 56(c); Beyene v. Coleman Security
3 Services, Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

4 In deciding whether to grant summary judgment, a court must
5 take three necessary steps: (1) it must determine whether a fact is
6 material; (2) it must determine whether there exists a genuine
7 issue for the trier of fact, as determined by the documents
8 submitted to the court; and (3) it must consider that evidence in
9 light of the appropriate standard of proof. Anderson, 477 U.S. at
10 248. Summary Judgment is not proper if material factual issues
11 exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260,
12 1264 (9th Cir. 1999). "As to materiality, only disputes over facts
13 that might affect the outcome of the suit under the governing law
14 will properly preclude the entry of summary judgment." Anderson,
15 477 U.S. at 248. Disputes over irrelevant or unnecessary facts
16 should not be considered. Id. Where there is a complete failure
17 of proof on an essential element of the nonmoving party's case, all
18 other facts become immaterial, and the moving party is entitled to
19 judgment as a matter of law. Celotex, 477 U.S. at 323. Summary
20 judgment is not a disfavored procedural shortcut, but rather an
21 integral part of the federal rules as a whole. Id.

22 **B. Standard for Leave to Amend**

23 Fed. R. Civ. P. 15(a) provides that "leave to amend shall be
24 freely given when justice so requires." The trial court has
25 discretion as to when to grant leave to amend. Leave to amend need
26 not be granted where such amendment would create undue prejudice to
27 the opposing party, is sought in bad faith, constitutes an exercise
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1 in futility, or creates undue delay. Forman v. Davis, 371 U.S.
2 178, 182 (1962).

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4 **B. ADEA Claims against a State**

5 Defendants claim that Plaintiff's first cause of action, for
6 illegal age discrimination in violation of ADEA, should be
7 dismissed because the Supreme Court has ruled that states have
8 Eleventh Amendment immunity from suits under the ADEA.

9 In Kimel v. Florida Bd. Of Regents, 528 U.S. 62 (2000), the
10 Supreme Court held that although Congress had created a clear
11 statement that it abrogated the state's sovereign immunity under
12 the Eleventh Amendment, because Congress had no power under Section
13 5 of the Fourteenth Amendment to enact such a provision, states
14 still had immunity from suit under the ADEA. The Ninth Circuit has
15 applied this holding to ADEA suits against state entities. See
16 Katz v. Regents of the Univ. of Cal., 229 F.3d 831, 833 (9th Cir.
17 2000); Arnett v. California Pub. Emples. Retirement Sys., 207 F.3d
18 565 (9th Cir. 2000).

19 Here, Plaintiff has not opposed the Motion for Partial Summary
20 Judgment on the argument that the Eleventh Amendment bars her first
21 cause of action for illegal age discrimination in violation of the
22 ADEA.

23 We find Defendants' argument persuasive. Plaintiff alleges
24 that the NSHE and Reed were state actors,¹ and since the Supreme

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26 ¹Defendant Reed is charged as a state actor as "his conduct is
27 otherwise chargeable to the state" as has been alleged in Plaintiff's
28 Complaint. Luger v. Edmondson Oil Company, Inc., 457 U.S. 922, 937
(1982).

1 Court has ruled that the Eleventh Amendment bars ADEA suits against
2 the state, Defendants' Motion for Partial Summary Judgment will be
3 granted and Plaintiff's First Cause of Action will be dismissed.

4 **C. Motion for Leave to Amend**

5 Plaintiff has moved to amend her Complaint to change her first
6 cause of action for illegal age discrimination under the ADEA to
7 illegal age discrimination under 42 U.S.C. § 1983 for a violation
8 Fourteenth Amendment's right to Equal Protection on the basis of
9 age. Defendants oppose the motion for leave to amend, stating that
10 such an amendment would be futile as there is no such cause of
11 action because the ADEA is the exclusive remedy for age
12 discrimination.

13 The Ninth Circuit has held that leave to amend can be denied
14 solely on the basis of futility. Bonin v. Calderon, 59 F.3d 815,
15 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify
16 the denial of a motion for leave to amend.").

17 Here, we find that amendment of the first cause of action to a
18 claim for illegal age discrimination under the Fourteenth
19 Amendment's Equal Protection clause would be futile and would thus
20 will deny Plaintiff's Motion for Leave to Amend.

21 As we held in Morgan v. Humboldt County School Dist., 623
22 F.Supp. 440, 443 (D. Nev. 1985), a "1983 action for the enforcement
23 of a federal statutory right is unavailable where the governing
24 statute provides an exclusive remedy for violations of its terms."

1 Morgan, 623 F.Supp. at 443 (internal citations omitted).² Because
2 the ADEA created an exclusive remedy scheme, we held that the ADEA
3 preempts the entire field of age discrimination. This includes
4 actions brought under § 1983 for violation of Fourteenth Amendment
5 Equal Protection rights. Because the ADEA preempts an action based
6 on 42 U.S.C. § 1983, no leave will be granted to amend the
7 Complaint in the proposed fashion. As we held in Morgan, "the ADEA
8 has a specific statutory scheme, which would be thwarted if the
9 Court were to allow a separate § 1983 action for the alleged age
10 discrimination." Morgan, 623 F. Supp. at 443.

11 Therefore, Plaintiff's motion for leave to amend will be
12 denied.

13 **IT IS HEREBY ORDERED** that Defendants' Motion for Partial Summary
14 Judgment on Plaintiff's first cause of action for illegal age
15 discrimination in violation of the ADEA (#9) is **granted**.

16 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Leave to Amend
17 the First Cause of Action (#15) is **denied**.

18
19 This 16th day of February, 2006.

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21 

22 UNITED STATES DISTRICT JUDGE
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24 ²The Supreme Court in Kimel held that States may discriminate on
25 the basis of age without offending the Federal Constitution's
26 Fourteenth Amendment if the age classification is rationally related
27 to a legitimate state interest. Kimel v. Fla. Bd. of Regents, 528
28 U.S. 62, 88 (2000). Our holding does not prevent Plaintiff from
filing a cause of action for violation of the Fourteenth Amendment
against Defendants.